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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JASON HOWARD,

Plaintiff and Respondent,

v.

CALIFORNIA STATE PERSONNEL  
BOARD,

Defendant and Appellant,

CALIFORNIA HIGHWAY PATROL,

Real Party in Interest and Appellant.

D064920

(Super. Ct. No. 37-2012-58263-CU-  
WM-NC)

APPEAL from a judgment of the Superior Court of San Diego County,  
Earl H. Maas III, Judge. Reversed with directions.

Alvin Gittisriboongul and Dorothy Bacskai Egel for Defendant and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney  
General, and Chris A. Knudsen, Deputy Attorney General, for Real Party in Interest and  
Appellant.

The Law Office of John Derrick and John G. Derrick for Plaintiff and Respondent.

The California Highway Patrol (CHP) dismissed Jason Howard from his position as a CHP officer for dishonesty, discourteous treatment of the public or other employees, and other failures of good behavior that caused discredit to the CHP. After the State Personnel Board (Board) upheld the dismissal, Howard challenged the Board's decision in the superior court by way of a petition for writ of mandate. The superior court granted the petition, concluding Howard's behavior warranted punishment, but not complete dismissal.

The CHP and Board appeal, arguing the trial court abused its discretion by modifying the penalty imposed on Howard. We conclude the Board did not abuse its discretion when it terminated Howard and the trial court improperly substituted its judgment as to the appropriate penalty.

#### FACTUAL AND PROCEDURAL BACKGROUND

The facts are largely undisputed. We summarize them to provide background for the CHP's and Board's contentions on appeal.

Jason Howard worked as a CHP officer for ten years. In 2006, Howard and CHP Officer Daniel LaRosa were assigned to work together and had a confrontation because LaRosa believed Howard did not have probable cause to stop certain vehicles. After the confrontation, LaRosa felt harassed by Howard and Howard's friends in the CHP. LaRosa ultimately transferred to another CHP location.

Around 2009, Officer Howard joked to other officers that he would buy a steak dinner for any officer who arrested LaRosa for driving under the influence (DUI). On a

night in November 2009, Howard was in a patrol vehicle with Officer Louis Ochoa. Officers Gabriel Morado and Suerita Salas were in another patrol vehicle. During the night, Howard saw LaRosa's personal vehicle parked in Carlsbad. Howard then engaged in a plan to pull LaRosa over. Howard, Ochoa, Morado and Salas tracked LaRosa's movements, even following LaRosa to an apartment complex where they parked and waited for LaRosa to exit and drive again.

During this time, Howard and Salas communicated on their cell phones regarding LaRosa's location. At one point, Salas told Howard that LaRosa had crossed double yellow lines. Howard asked Salas if she was going to stop LaRosa. Salas responded by stating, "I'm not going to stop him. This is your beef." Howard stopped LaRosa and arrested him for drunk driving.

Howard asked his supervisor, Sergeant Kenny Perez, for guidance in writing the arrest report on LaRosa. Howard told Sergeant Perez that he first saw LaRosa's vehicle when Howard was at a 7-Eleven. In response to Sergeant Perez's questions, Howard stated he had not been pursuing LaRosa and did not know LaRosa was driving. Howard never disclosed to Sergeant Perez that he and the other officers had followed LaRosa. Howard also failed to tell Sergeant Perez that he and the other officers actively looked for LaRosa, made cell phone calls to each other, and staked out an apartment complex for a period of time. Based on what Howard told him, Sergeant Perez believed LaRosa's arrest was an ordinary DUI arrest with nothing unusual about it. Sergeant Perez told Howard to prepare a normal report and not treat LaRosa different.

Howard prepared an arrest report relating to LaRosa's arrest. Howard did not include critical details in the report. For example, Howard did not state that he and the other officers followed LaRosa, communicated with each other about LaRosa's location, and waited outside an apartment complex LaRosa had entered. Howard also failed to state that he knew LaRosa was driving the car he pulled over. Instead, Howard wrote the following: "As I contacted the driver of the subject vehicle, I recognized him as Daniel LaRosa, an Officer that was assigned to my office a few years ago."

After LaRosa's arrest, Salas stated to Christopher Ramos, who had been riding along with the officers, "[W]hat you saw here tonight, you don't repeat or mention to anyone. Tonight did not happen." Ramos felt something was wrong and reported the incident to another officer. The CHP initiated an investigation into the matter and placed Howard on administrative leave.

Two or three weeks later, CHP investigators interviewed Howard. The version of events Howard told investigators omitted many of the same facts as his arrest report. Howard stated he saw a black vehicle pull into an apartment complex so he "just continued about [his] business patrolling in the area, [and] ended up seeing another black vehicle . . . on the freeway," which was weaving. Howard did not tell investigators he waited outside the apartment complex. Howard suggested he did not know LaRosa was driving the vehicle he pulled over until he walked up and got close to the vehicle. When asked about his communications with Salas on the night of the incident, Howard stated he did not recall sending Salas any text messages.

After the interrogation, Howard's representative confirmed Howard's belief that the interview did not go well and suggested to Howard that Howard was being untruthful. Howard requested a second interrogation to clarify information he provided earlier. This time, Howard admitted that he targeted LaRosa for arrest and planned to arrest LaRosa "come hell or high water." Howard also admitted that he did not tell Sergeant Perez important information about LaRosa's arrest because "[he] knew it wasn't right" and "the tactics [he] used were wrong."

Howard claimed he initially provided incomplete answers to the investigators' questions due to his failed recollection. Howard stated that he had been under a lot of stress and was seeing a therapist. He claimed he previously had a panic attack and his therapist told him he was impacted by responding to fatal drunk driving accidents.

In August 2010, the CHP served Howard with a notice of adverse action dismissing Howard from his position as an officer. Howard appealed the dismissal to the Board. During an administrative hearing, Howard conceded that his arrest report had been incomplete. He also admitted withholding relevant information from Sergeant Perez and not giving the investigators accurate information. Howard claimed his memory was compromised and he did not intentionally make misstatements.

Howard and the CHP each put on extensive evidence regarding posttraumatic stress disorder (PTSD). In essence, Howard's therapist testified that in her opinion, Howard suffered from PTSD. The CHP's expert, on the other hand, testified that Howard's behaviors both prior to and after LaRosa's arrest were not consistent with PTSD.

After hearing the evidence, the administrative law judge (ALJ) found that Howard's conduct constituted dishonesty and other failures of good behavior. However, the ALJ modified Howard's penalty from dismissal to a ninety-day suspension, which the ALJ found was "just and proper under the circumstances." The Board rejected the ALJ's proposed decision and informed the parties that it would decide the case itself. After hearing the parties' arguments and reviewing the entire record, the Board adopted "the ALJ's factual findings and legal conclusions that [Howard's] oral and written reports regarding the arrest established dishonesty [citation] and that [Howard's] failure to report orally or in writing that he and other CHP officers had conducted a surveillance of LaRosa prior to the arrest constituted other failure of good behavior [citation]." Additionally, the Board rejected Howard's argument that PTSD caused his dishonesty. Ultimately, the Board concluded that dismissal was the appropriate penalty for Howard's conduct, reasoning that "the harm of [Howard's] misconduct on the public service is unmistakable. He intentionally misrepresented the circumstances surrounding LaRosa's arrest when he spoke with Perez, wrote the arrest report, and responded to questions during his interrogations. Thus, [Howard] was dishonest on multiple occasions and in work-related settings where his candor and truthfulness was of paramount importance. [¶] [Howard's] misconduct related directly to his duties and responsibilities as a CHP . . . Officer. Inaccurate arrest reports tarnishes an Officer's ability to testify truthfully and accurately in a court of law, which is an important duty of peace officers. Further, an officer's dishonesty creates a serious lack of public trust, which negatively impacts CHP and law enforcement in general."

Howard petitioned the superior court for writ of mandate. Howard argued the Board abused its discretion in rejecting the ALJ's proposed decision of a ninety-day suspension. The CHP contended the ALJ's decision had no effect once the Board rejected it, substantial evidence supported the Board's decision, and dismissal was the proper penalty for Howard's conduct. The superior court reinstated the ALJ's decision, noting "[t]he Court ha[d] considered [Howard's] many years of service to the state and his prior commendations for exceptional service. The Court sees no persuasive evidence that this action is likely to be repeated and the harm to the public was not irreparable." Accordingly, the superior court reinstated the ALJ's penalty of a ninety-day suspension.

## DISCUSSION

### I. *Standard of Review*

"Trial court review of an administrative decision is governed by Code of Civil Procedure section 1094.5. Subdivision (b) of section 1094.5 limits the extent of the reviewing court's inquiry 'to the questions whether the [administrative tribunal] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.' In determining whether there was an abuse of discretion, the reviewing court may consider whether the administrative tribunal proceeded in the manner required by law, whether its order or decision is supported by the findings, and whether the findings are supported by the evidence. [Citation.]" (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 742.)

An administrative agency has very broad discretion in determining the appropriate discipline for public employee misconduct, and an abuse of discretion must "'appear very clearly before the courts will interfere.'" (*Talmo v. Civil Service Com.* (1991) 231 Cal.App.3d 210, 230 (*Talmo*); accord, *Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) ""[C]ourts should let administrative boards and officers work out their problems with as little judicial interference as possible. . . ."" (*Cummings v. Civil Service Com.* (1995) 40 Cal.App.4th 1643, 1652-1653.) Thus, if reasonable minds may differ as to the propriety of the penalty imposed, there has been no abuse of discretion. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 46 (*Deegan*).) It is only in the exceptional case that an abuse of discretion is shown. (*Id.* at p. 47.) Even where the penalty appears harsh to us, we are not free to substitute our discretion for that of the administrative body. (*Gonzalez v. State Personnel Bd.* (1995) 33 Cal.App.4th 422, 428-429 (*Gonzalez*).)

In determining the appropriate discipline, "the overriding consideration . . . is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, '[h]arm to the public service.' [Citations.] Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence." (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.)

## II. Howard's Penalty

The CHP raises a number of issues concerning the sufficiency of the evidence to support the Board's findings that Howard was dishonest and engaged in conduct that constituted a failure of good behavior. The CHP also asks this Court to find that PTSD



does not excuse a peace officer's dishonesty. However, Howard does not dispute the facts, including his dishonesty, admitting that "he did not tell the full truth" after LaRosa's arrest. He also concedes that substantial evidence supported the Board's finding that PTSD did not cause his dishonesty. Based on Howard's concessions and the ample evidence in the record supporting them, we need not consider the CHP's sufficiency of the evidence arguments and turn to whether the Board abused its discretion in imposing a penalty of dismissal on Howard.

"'A [law enforcement officer's] job is a position of trust and the public has a right to the highest standard of behavior from those they invest with the power and authority of a law enforcement officer. Honesty, credibility and temperament are crucial to the proper performance of an officer's duties. Dishonesty is incompatible with the public trust.' [Citation.] Dishonesty is not an isolated act; it is more a continuing trait of character. False statements, misrepresentations and omissions of material facts in internal investigations, if repeated, would result in continued harm to the public service." (*Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716, 721 (*Kolender*).)

Several courts have upheld dismissals of peace officers based on the officer's dishonesty. For example, the court upheld a deputy sheriff's dismissal where the deputy sheriff had made false and misleading statements to his supervisor about his health and sick leave usage. (*Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 969, 972.) Similarly, in *Warren v. State Personnel Bd.* (1979) 94 Cal.App.3d 95, 107, the court held discharge of a CHP officer was appropriate where the officer had attended a

transvestite party and gave false answers about it to investigating officers and superiors. (*Ibid.*) Likewise, in *Kolender, supra*, 132 Cal.App.4th at pp. 721-723, this Court found termination was an appropriate remedy for a deputy sheriff who lied to investigators about a fellow deputy's physical abuse of an inmate. (See also *Ackerman v. State Personnel Bd.* (1983) 145 Cal.App.3d 395, 398-399 (*Ackerman*) [holding the Board did not abuse its discretion in dismissing a CHP officer who misappropriated state-owned motorcycle parts and subsequently made false statements about his conduct to an investigating officer].)

Here, Howard engaged in multiple and continuing acts of dishonesty. He first lied to his supervisor about the details of LaRosa's arrest, then omitted material facts in his arrest report, and finally lied to investigators. Howard admitted that he provided incomplete information to Sergeant Perez, omitted critical details from his arrest report, and gave inaccurate information to investigators. It was only after Howard's representative told him that the interview with investigators did not go well that Howard finally stepped forward to provide more complete details about LaRosa's arrest. At that point, Howard admitted he did not tell Sergeant Perez important information about LaRosa's arrest because "[he] knew it wasn't right" and "the tactics [he] used were wrong."

Howard's admitted dishonesty discredited him and the CHP. As Howard himself explained, "As law enforcement, Highway Patrol, [honesty is] the core of everything that we are. If we can't be honest with the people that we're dealing with or with the courts dealing with those people, then our word's not worth anything and our

profession's not worth anything." "The CHP necessarily must totally rely on the accuracy and honesty of the oral and written reports of its officers . . . . 'Any breach of trust must therefore be looked upon with deep concern. *Dishonesty in such matters of public trust is intolerable.*'" (*Ackerman, supra*, 145 Cal.App.3d at p. 400.)

Howard contends dismissal was not a just and proper punishment because his superiors spoke highly of his professionalism and honesty, his violation of an unwritten rule within the CHP that officers should not arrest other officers caused his lack of candor, and his superior officer first made the remark about buying a steak dinner for anyone who arrested LaRosa. None of these reasons excuse Howard's conduct, especially where the harm to the public service is evident. Further, Howard was well aware that CHP officers are held to a high standard and that integrity and honesty are critical to their job. Howard's dishonesty violated the core principles of the CHP and involved his essential job functions. Under these circumstances, the Board's decision to dismiss Howard did not exceed the bounds of reason.

Lastly, we are not persuaded by Howard's reliance on *Blake v. State Personnel Board* (1972) 25 Cal.App.3d 541 (*Blake*). The facts of the instant case are easily distinguishable from *Blake*. In that case, a supervising deputy labor commissioner with 19 years of exemplary service pointed a gun at a fellow employee at a gathering outside of duty hours. (*Id.* at pp. 546-547, 553.) The court found dismissal was excessive because the record lacked direct testimony that working relationships were affected, the dismissed employee's conduct occurred after a social evening during which the group had several drinks, and the dismissed employee apologized the following morning,

acknowledged his wrongful conduct and stated it would not recur. (*Id.* at 554.) Unlike the case before us, the dismissed employee in *Blake* admitted his wrongdoing the day after the incident. Here, Howard engaged in a course of dishonesty over weeks and did not rectify the situation until his representative confronted him. Moreover, unlike the employee in *Blake*, as a peace officer, Howard was in a position that had a heightened responsibility of honesty, trust and integrity.

"It may be that others might have decided that a term suspension rather than discharge was the appropriate sanction but '[t]he fact that reasonable minds may differ as to the propriety of the penalty imposed [will fortify] the conclusion that the administrative body acted within the area of discretion.' [Citation.]" (*Ackerman, supra*, 145 Cal.App.3d at p. 401.) Reasonable minds clearly differed in this case as the ALJ and the superior court, after reviewing the record and considering Howard's prior commendations for exceptional service, concluded dismissal was not warranted and imposed a ninety-day suspension. However, the Board is vested with very broad discretion in determining the appropriate discipline for public employee misconduct (*Talmo, supra*, 231 Cal.App.3d at p. 230) and courts shall not interfere absent a clear showing of abuse of discretion. (*Deegan, supra*, 72 Cal.App.4th at p. 46; *Gonzalez, supra*, 33 Cal.App.4th at pp. 428-429.) Based on the record before us, we conclude the Board's decision to dismiss Howard was within the bounds of reason and thus there was no abuse of discretion.

## DISPOSITION

The judgment is reversed. The superior court is directed to vacate its judgment granting Howard's petition for writ of mandate and to enter a new judgment denying the petition. Appellants are entitled to recover costs on appeal.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.